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No. —

In The
Supreme Court of the United States

JERRY PAULL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the United States Constitution forbids a District Court from increasing a defendant's sentence by more than 7 years on facts, including prior uncharged conduct and aggravating factors, that are found by the District Court and not admitted to or found to be true by a jury beyond a reasonable doubt.

II. Whether the Confrontation Clause forbids the District Court to find uncharged relevant conduct from an unauthenticated email from London, England during a sentencing hearing and increasing a 62-year-old defendant's sentence by more than 7 years.

III. Whether the District Court's sentence of 17½ years imposed on a sickly, 62-year-old defendant with no prior record, facing a five year minimum mandatory sentence is greater than necessary to comply with the purposes of 18 U.S.C. 3553(a) and is substantively unreasonable.

IV. Whether the knowledge mental state requirements of 18 U.S.C. 2252 and 2252(A) make those statutes unconstitutionally vague applied to mere possessors of child pornographic material given that citizens and digital imaging experts cannot visually distinguish illegal child pornographic material from apparent, but constitutionally protected child pornographic material.

V. Whether 18 U.S.C. 2252 and 2252(A) are unconstitutionally overbroad lacking a scienter requirement punishing both intentional and accidental receipt and possession of child pornographic material regardless of a citizen's intent.

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Mr. Jerry Paull respectfully petitions this Honorable Court for a Writ of Certiorari to review the judgment of the District Court of the Northern District of Ohio and the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

This case began in the United States District Court in the Northern District of Ohio. Paull's sentence and the District Court's ruling on his motion to suppress was appealed to United States Court of Appeals for the Sixth Circuit. The unreported sentencing decision is reproduced as Appendix B.

On Appeal, the court rejected, in a 2-1 decision, each of Paull's assignments of error. *United States v. Paull*, 551 F.3d 516 (2009). The court denied a motion for rehearing en banc. In the motion for rehearing, Paull limited his motion for rehearing on three issues. The motion for rehearing en banc was denied on March 26, 2009.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered its judgment on January 9, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1257. Petitioner properly invokes the jurisdiction of this Honorable Court by filing the instant Petition on or before June 24, 2009.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make

> or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is an appeal from pre-trial rulings and a sentencing hearing in a computer-based child pornography case and the District Court's reliance on unsworn, uncorroborated statements in drastically enhancing Mr. Paull's sentence.

Mr. Paull, a sickly first time offender, was 62-years old at sentencing with no criminal record. He pleaded guilty to receiving child pornography from the internet, a crime that carries a 5 year mandatory minimum sentence. Mr. Paull received a 17-1/2 year sentence.

The FBI searched Paull's residence on June 23, 2004. They found a garbage can with a number of double and triple bagged bundles inside. (R.77, Suppression. Hg. 01/08/2007 Tr. 49). Inside the double and triple bagged sacks police found printed images of child pornography, floppy disks, a number of CDs, videotapes and computer printouts from Mr. Paull's computer. Id. at 49-50. Mr. Paull was arrested and charged with receiving and possessing child pornography.

After the execution of the search warrant, Mr. Paull dedicated himself to breaking his addiction and helping others break their addiction to internet

pornography by volunteering at the Fellowship of Former Sex Addicts. Id. at 55. Mr. Paull also sought and received ongoing counseling for his own addiction and mental illness. Mr. Paull did not commit any new offenses during the two and one-half years after the raid of his home.

At all times relevant to this case, Mr. Paull suffered from a litany of medical conditions and complications from Type I diabetes. According to Paull's treating physician, Paull suffered from retinopathy, neuropathy, frequent severe hypoglycemia, osteoporosis, Meniere's, severe vertigo, hypercholesterolemia, has a history of bronchiectasis and coronary artery disease. See, Opinion at Appendix 26-27, citing the portions of the pre-sentence report. The doctor also stated Paull is at significant risk for acute vertigo and falls which, given his osteoporosis, could have disastrous consequences such as bone fractures. Id. Mr. Paull is also prone to pneumonia based on having bronchiectasis. Id. Individuals with cardiac autonomic neuropathy similar to Mr. Paull can have a 50% 5 year mortality rate. Id.

Mr. Paull was sentenced on April 5, 2007. On a prior date, the court granted a two-day continuance to accommodate the government in obtaining a witness' appearance. The witness failed to appear. Nevertheless, a claimed e-mail message from the claimed witness was admitted and considered at sentencing hearing and used to increase Paull's sentence.

At sentencing, Paull explained how he found himself hopelessly locked in a cycle of addiction to internet pornography. He explained how he began to

break his addiction prior to the raid of his home by scrubbing his computer of all images and artifacts that would direct his computer to pornography sites or advertisements. Id. at 51. Paull cancelled his subscriptions to pornographic websites and attempted to block his credit card from making online purchases. Id. at 51-54.

Mr. Paull's entire allocution is steeped in remorse. Id. at 45-57.At his sentencing hearing, Mr. Paull explained:

> What I did do was download and purchase pornography. And when I look back at that, it makes me sick. It makes me sick. I loathe what I did. There isn't a word that's strong enough for me to describe how stupid that was. It was just plain wrong.

(R.81, Sent. Hg. 04/05/2007 Tr. 47, see also, 50). He later explained:

> I know that I have offended people who loved me and trusted me through my addiction to internet pornography, and I have tried to make amends where I can. And because there are anonymous young people with whom I cannot make any direct amends, I have tried to make indirect amends by contributing to the Fellowship of Recovering Sex Addicts. I have donated my time and my financial resources, even as stretched as they are.

Id. at 55.

The probation officer acknowledged "the defendant's statement [in the PSI] would be sufficient to recommend Acceptance of Responsibility". (03/16/07 Revised PSI at Para. 30.) The trial court denied Paull a two-level reduction for Acceptance of Responsibility.

The District Court increased Paull's sentence finding that he obstructed justice by scrubbing his computer and allegedly lying during the suppression hearing. The District Court increased Paull's sentence based on the unauthenticated e-mail received by the probation department.

The District Court ordered Mr. Paull to serve 17-1/2 years in prison. (R.80, Plea Hg. 04/05/2007 Tr. 61). This is effectively a death sentence. Recognizing this fact, the District Court's final words to Mr. Paull were:

> I recognize the length of sentence that is being imposed here today, what that does to you.

(R.81, Sent. Hg. 04/05/2007 Tr. 63-64).

Mr. Paul has only a 50% chance of surviving the first third of his prison sentence. The Sixth Circuit recognized this fact when it stated: "Paull is a former minister who has admirably worked with a sex addiction group at rehabilitating himself and others, and the combination of his age, his various health problems, and the length of his sentence mean he almost certainly will die in jail or shortly after his sentence expires." Opinion at 18. Judge Merritt, in his dissent questions, "How could this sentence be 'not greater than necessary' to punish the crime?" Id. at 24.

The Sixth Circuit appeal challenged Paull's 17-1/2 year sentence in addition to several pre-trial rulings and issues surrounding the suppression hearing.

REASONS FOR GRANTING THE WRIT

The issues presented in this Petition grow from this Court's Sixth Amendment jurisprudence. The Sixth Circuit's ruling conflicts with the United States Supreme Court's Rulings in *Blakely v. Washington*, infra, *United States v. Booker*, infra, and *Crawford v. Washington*, infra. Stated concisely, the issues presented are as follows:

I. The United States Constitution forbids a judge from increasing a defendant's sentence on facts, including aggravating factors used at sentencing, that are found by the judge and not admitted to or found to be true by a jury beyond a reasonable doubt.

II. The Confrontation Clause applies during adversarial sentencing hearings involving disputed facts surrounding alleged uncharged criminal conduct.

III. The District Court's sentence is substantively unreasonable where it is greater than necessary to comply with the purposes of 18 U.S.C. 3553(a) and is substantively unreasonable.

IV. The knowledge mental state requirements of 18 U.S.C. 2252 and 2252(A) make those statutes

unconstitutionally vague as applied to mere possessors of child pornographic material given that citizens and digital imaging experts cannot visually distinguish illegal child pornographic material from apparent, but constitutionally protected child pornographic material.

V. 18 U.S.C. 2252 and 2252(A) are unconstitutionally overbroad because they lack a scienter requirement ignoring a citizen's intent and punishing both intentional and accidental receipt and possession of child pornographic material regardless of that intent.

The issues presented are significant and recurrent. This Court has recently issued several opinions regarding the scope and application of the Confrontation Clause and this matter is a natural companion to those cases. This case allows the Court to explain what evidence, as a matter of Constitutional Law, may be considered by a court in fashioning a felony sentence.

These recurring constitutional questions need the attention of this Honorable Court. This case provides the opportunity for the court to define the scope of the application of the Confrontation Clause and the Sixth Amendment right to a jury trial at sentencing.

I. The United States Constitution forbids a District Court from increasing a defendant's sentence by more than 7 years on facts, including prior uncharged conduct and aggravating factors, that are found by the District Court and not admitted to or found to be true by a jury beyond a reasonable doubt.

The increased offense level in the instant matter violates Paull's Sixth Amendment right to a jury trial, his Confrontation rights and his Due Process rights.

In *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), Justice Scalia assailed the notion that the Sixth Amendment could mean that a "jury need only find whatever facts legislature chooses to label elements of the crime, and that those it labels sentencing factors — no matter how much they may increase the punishment — may be found by the judge." The problem, explains Justice Scalia, is that this "would mean, for example, that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it — or of making an illegal lane change while fleeing the death scene." This is happened in this case and continues in District Courts across the country. See , *United States v. Vernier*, 2004 WL 2110413 (S.D. Fla. Sept. 17, 2004) (defendant in federal court was sentenced for a uncharged murder), *United States v. Gigante*, 39 F.3d 42 (2d Cir. 1994), vacated and superseded in part on denial of rehearing, 94 F.3d 53 (2d Cir. 1996) (defendants convicted of extortion sentenced for several uncharged murder conspiracies found by a preponderance of the evidence), *United States v. Welch*, No. 03-3638 (7th Cir. Nov. 21, 2005) (district court nearly doubled the

defendant's sentence based on its finding that the defendant had committed four other bank robberies that were never formally charged.)

Similar to these cases and others, Mr. Paull's federal sentence was dramatically increased based on an allegation of prior unproven and uncharged criminal conduct. Conduct he was not permitted to challenge by cross examining the alleged accuser.

A. The application of 2G2.2(b)(4) in the instant matter is in direct contravention of Mr. Paull's Sixth Amendment right to jury trial.

The Constitution forbids judges from increasing sentences reliant on facts not admitted to or found by a jury. *Blakely v. Washington*, ibid at 304-305, *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). The increase of Paull's sentence relied entirely upon judicial findings of fact. His case is not uncommon; District Court judges across the country routinely rely on uncharged conduct at sentencing despite the inability of defendants to confront the allegations.

The District Court here increased Paull's offense level five levels on rumor and innuendo. The probation officer received an unauthenticated, purported e-mail message from someone claiming to be Andrew Barry, living in England and the son of a former Paull family friend. The email text claimed Barry was touched inappropriately by Paull 15 years earlier. (03/16/07, Revised PSI at Para. 22.) The allegation was never reported to police. The other evidence consisted of a phone conversation between the probation officer and a voice claiming to be Barry's mother.

No one claiming to be Andrew Barry testified. Someone the government claimed was Barry informed the government he would come to the sentencing. The sentencing was continued two days so the claimed Barry could appear in court and subject his story to the crucible of cross-examination. (R.81, Sent. Hg. 04/05/2007 Tr. 24). Paull has, at all times, vehemently denied these allegations. On the morning of April 5, 2007, someone claiming to be Barry left a voice message claiming he was in either Illinois or Western Ohio and due to the weather, he could not attend the sentencing. Id. at 12. The sentencing spanned nearly two hours and Barry never made an appearance. Id. Based on the unauthenticated e-mail, the trial court increased Paull's offense level by five levels. Id. at 19, 23-24.

This type of evidence falls short of what this Court has held the right to trial by jury demands: "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *United States v. Booker*, 543 U.S. 220, 244, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). This Court restated this rule in *Cunningham v. California*, 549 U.S. 270, 127 S.Ct. 856, 863-64, 166 L.Ed.2d 856 (2007). The *Cunningham* Court reemphasized and then stated again that increasing sentences through judicial fact finding violates the Sixth Amendment:

> If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied.

Id. at 869. Finally, this Court held that Justice Breyer's remedial opinion in *Booker* does not alter the rule against increasing the sentence by judicial, factual findings of enhancements:

> *Booker*'s remedy for the federal guidelines, in short, is not a recipe for rendering our Sixth Amendment case law toothless. [Footnote 15] Justice Alito, however, would do just that. His opinion reads the remedial portion of the Court's opinion in *Booker* to override *Blakely*, and to render academic the entire first part of *Booker* itself.

As discussed in *United States v. Thompson*, 515 F.3d 556 (6th Cir. 2008) (J. Merritt, dissenting):

> the sentencing judge should start with the base offense level corresponding to the facts found by the jury verdict or admitted by the guilty plea. The sentencing judge should not go up or down from that point unless in his or her own mind the weighing process of the two overriding principles stated above requires it. The judge should not engage in guidelineism, adjusting the sentence up or down just because the guidelines say so, as occurred in the instant case, but rather because the judge's own sense of justice, upon reflection, leads to a different result than the beginning, base-offense level. This allows the guidelines to play a pivotal role to begin with but requires the judge to use his or her own mental faculties and best judgment, just as judges did in the days of indeterminate

> sentencing before the mandatory federal sentencing guideline era.

Id. at 573, see also *United States v. Phinazee*, 515 F.3d. 511, 526 (6th Cir. 2008).

As explained by the dissent below, "guidelinesim" has become engrained in the Sixth Circuit's jurisprudence despite running afoul of the Sixth Amendment. This case is an opportunity to right this wrong and offer guidance on the proper application of *Blakely* and its progeny in future cases. The modified system articulated in the dissent in *Thompson* and *Phinazee*, supra, is consistent with the Sixth Amendment and should be adopted by this Court. This proposed system is consistent with the Sixth Amendment, and will provide for more consistent reviews from Circuit Court's across the country.

B. The application of 2G2.2(b)(4) in the instant matter is in direct contravention of Mr. Paull's right to due process of law.

The Fifth Amendment's Due Process Clause offers a limited right to confrontation at parole revocations and other similar proceedings. See, *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973). This Court should hold Due Process requires Paull have the right to confront and cross-examination persons at sentencing hearings.

II. The Confrontation Clause forbids the District Court to find uncharged relevant conduct from an unauthenticated email from London, England during a sentencing hearing and increasing a 62-year-old defendant's sentence by more than 7 years.

Judge Merritt in his appeal dissent noted objected to the use of "double hearsay" to increase sentences and specifically rejected the increase of Paull's sentence by "five levels and many years."

In an adversarial sentencing hearing, the need for precise and accurate findings of disputed facts about other criminal conduct requires, at a minimum, the crucible of cross-examination before the district court can dramatically increase a sentence based on uncharged conduct. As discussed in *United States v. Silverman*, 976 F.2d 1502, 1524-27 (6th Cit. 1992), by Judge Merritt, dissenting and joined by Judges Keith, Martin and Jones, the United States Supreme Court has held that the Confrontation Clause may apply at sentencing hearings.

> In *Specht v. Patterson*, 386 U.S. 605, 18 L. Ed. 2d 326, 87 S. Ct. 1209 (1967), the Court required the application of the Confrontation Clause to the sentencing system at hand. There the Colorado sentencing system allowed the sentence to be increased to life from a maximum of 10 years upon a finding by the sentencing judge that the offender, based on past conduct, "if left at large, constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill." Id. at 607. The Court said the Colorado system of enhanced

> sentencing contemplated an adversary proceeding and "a new finding of fact that was not an ingredient of the offense charged." Id. at 608. Under such circumstances the alleged offender must "have an opportunity to be heard, be confronted with the witness against him, have the right to cross-examine, and to offer evidence of his own." Id. at 610.

Silverman, 976 F.2d at 1526.

The continued use of uncharged conduct to enhance sentences has its roots in the scrutiny of the declarant called for in *Ohio v. Roberts*, 448 U.S. 56 (1980). That case, according to *Crawford v. Washington*, is still law in non-testimonial non-Confrontation Clause settings. A sentencing hearing is a Confrontation Clause setting.

Crawford v. Washington, 541 U.S. 36, 158 L.Ed. 2d 177 (2004), holds that the confrontation clause bars "testimonial" hearsay without the opportunity to cross examine. Id. "The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed in courts". 541 U.S. 36, 54.

Under *Ohio v. Roberts*, Paull's sentence should be vacated even without this court revisiting the question of whether the Confrontation Clause applies in sentencing hearings. The Sixth Circuit questioned the District Court's reliance on Barry's unauthenticated e-mail, and commented, "[a]lthough a judge may consider otherwise inadmissible evidence in calculating a sentence, any evidence upon which the judge relies *must have sufficient indicia of reliability*."

Opinion at 14, citing *United States v. Silverman*, 976 F.2d 1502, 1511. Neither the District Court nor the Sixth Circuit found the hearsay statements at issue to carry any indicia of reliability. Judge Merritt, dissenting, found there was "not even an effort to show that the evidence was reliable."

Due process requires more than mere allegation be presented to support consideration of such conduct as relevant to sentencing. "As a matter of due process, factual matters may be considered as a basis for sentence only if they have some minimal indicium of reliability beyond mere allegation." *United States v. Baylin*, 696 F.2d 1030, 1040 (3d Cir. 1982).

This was a purported e-mail message, from England, that alleged conduct occurring more than 15 years earlier. Not a single judge has found any "indicium of reliability beyond mere allegation" in this case.

III. The District Court's sentence of 17½ years imposed on a sickly, 62-year-old defendant with no prior record, facing a five year minimum mandatory sentence is greater than necessary to comply with the purposes of 18 U.S.C. 3553(a) and is substantively unreasonable.

The Sixth Circuit's review of a defendant's sentence for reasonableness consists of two components, a review for substantive reasonableness and a review for procedural components. *United States v. Jones*, 489 F.3d 243, 250 (6th Cir. 2007). A sentence may be substantively unreasonable where, inter alia, the district court fails to consider pertinent § 3553(a)

factors, or gives an unreasonable amount of weight to any pertinent factor. *Jones*, 489 F.3d at 252.

Paull advanced two arguments for why his sentence is substantively unreasonable.[1] Both were rejected by the Sixth Circuit. This Petition presents the same questions for this Court's review.

A. *The district court failed to meaningfully consider the factors set forth in 18 U.S.C. 3553(a) and Mr. Paull's arguments pursuant to 3553(a).*

Paull maintains that the district court was unreasonable in its consideration of his circumstances and those of the offense. Paull has no criminal record and was 62 years old at sentencing.

When considering adequate deterrence to criminal activity, the mandatory minimum five-year term of incarceration is adequate deterrence to Paull. Paull began to break his addiction to child pornography *prior* to the June 23, 2004 raid of his home. (R. , Sent. Hg. 04/05/2007 Tr. 51-54). After the raid, Paull took the remarkable step of helping and encouraging others to break their own addictions. Paull deterred others from engaging in criminal conduct similar to his own conduct.

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[1] First, the trial court failed to meaningfully consider the factors set forth in 18 U.S.C. 3553. Second, the district court placed an unreasonable amount of weight on the harm suffered by the victim's of child pornography.

When considering the need for educational or vocational training, medical care or other corrective treatment, two critical factors must be highlighted. First, Paull saddles the government with an extraordinary financial burden due to Paull's catalogue of health concerns. Paull's critical health situation is well-documented; indeed, the U.S. Marshall joined defense counsel in a motion to reinstate Mr. Paull's bond pending sentencing due to the Paull's fragile health. Second, the need for correctional treatment is minimal. Paull had completed outpatient treatment for pornography addiction and was in the midst of aftercare at the time of sentencing. All of which is relevant to what sentence affords adequate deterrence to criminal conduct and is not greater then necessary to comply with the purpose of the Sentencing Guidelines.

Section 3553(a)(6) requires sentencing courts to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." Judge Merritt in his dissenting opinion determined that Mr. Paull's "17-1/2 year sentence... may be the longest yet" for a computer based child-pornography case involving a mentally-ill defendant like Paull. Moreover, this court has determined shorter sentences for similarly situated offenders to be sufficient, but not greater than necessary, to comply with 18 U.S.C. § 3553(a)(1), see, *United States v. Cherry*, 487 F.3d 366 (6th Cir. 2007), *United States v. Kirchhof*, 505 F.3d 409, 413 (6th Cir. 2007).

Mr. Paull's age, health and lack of prior record all call for a downward departure. In addition, Paull stopped his criminal conduct *prior* to law enforcement

involvement, and started his rehabilitation on his own prior to his arrest. Paull also continued his treatment and attempted to make amends with numerous unknown victims of child pornography by volunteering his time to help and deter others.

B. The district court placed an unreasonable amount of weight on the harm suffered by the victim's of child pornography.

A sentence may also be substantively unreasonable where the Court "***giv[es] an unreasonable amount of weight to any pertinent factor.'" *United States v. Ferguson*, 456 F.3d 660, 664 (6th Cir. 2006) (quoting *United States v. Webb*, 403 F.3d 373, 385 (6th Cir. 2005)).

Prior to sentencing, the District Court reviewed letters from two victims allegedly depicted in images found at Paull's residence. Throughout Mr. Paull's hearing the District Court repeatedly emphasized and re-emphasized the harm inflicted on the victims of child-pornography. (R.81, Sent. Hg. 04/05/2007 Tr. 57, 58-59, 61, 64.) In assigning a great amount of weight to the victims' statements, the court ignored the fact that the harm sustained by victims is built into the sentencing guidelines. Indeed, the harm sustained by the victims of child pornography is a static sentencing factor that exists in each and every case and was presumably considered by the Sentencing Commission when it created a five-year mandatory minimum sentence.

Considering the circumstances surrounding the underlying crime, this is a typical receipt case. Paull did not play a direct role in the victimization of

anyone. He did not sell any images or distribute them, and he did not produce the images. Mr. Paull's recognition of wrongdoing and attempts at recovery and help to others, make this case exceptional compared to other receipt cases. He went above and beyond many other defendants in his rehabilitation and that of his work with others. Mr. Paull asks this Honorable Court to accept the instant matter in order to hold that when an offense carries with it a mandatory minimum, the harm caused to the victim's is built-in to the mandatory minimum sentence.

IV. The knowledge mental state requirements of 18 U.S.C. 2252 and 2252(A) make those statutes unconstitutionally vague applied to mere receivers or possessors of alleged child pornographic material given that citizens and digital imaging experts cannot visually distinguish illegal child pornographic material from apparent, but constitutionally protected child pornographic material.

To know the apparent contents of a computer file a user must open and view the file. Merely by visual examination, a user cannot know whether the apparent child pornographic image is an authentic image or video, i.e. a violation of the statutes or the exercise of their constitutional right. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S.Ct. 1389 (2002).

A. Rule of Vagueness

"Laws that are insufficiently clear are [unconstitutional and] void....[1]*to avoid punishing people for behavior that they could not have known was*

illegal...and...[2]to avoid any chilling effect on the exercise of sensitive First Amendment freedoms." *United States v. Williams*, 444 F.3d 1286, 1305-06 (11th Cir. 2006)) (Emphasis added. (reversed on other grounds).

B. Lack of Capacity Affects Applicability of Statutes

We do not punish persons lacking capacity to know they are committing criminal offenses. See *Thompson v. Oklahoma* 487 U.S. 815 (1988) for discussion on capacity and age; See *Clark v. Arizona*, 548 U.S. 735 (2006), for discussion of capacity and mental defect. The government has the burden to establish citizens have the capacity to form the necessary mens rea contained in the statute. See *Leland v. Oregon*, 343 U.S. 790, 799 (1952); *Davis v. United States*, 160 U.S. 469, 486-487, 16 S.Ct. 353, 40 L.Ed. 499 (1895); *M'Naghten's Case*, 10 Cl. & Fin., at 210, 8 Eng. Rep., at 722. The government is not entitled to a presumption that a citizen has this capacity.

C. The Statute Cannot Be Applied to Persons Who Lack Capacity to Know They Are Violating it

The statutes' use of the word "knowingly" is vague. Paull lacks the capacity to know whether a given image or video is contraband under the statute or constitutionally protected. Government experts lack the capacity to make that distinction. *United Sates v. Frabizio*, 2006 WL 2384836 (D.Mass. Aug. 11, 2006). See also, concurrence in *United States v. Wilder*, 2008 WL 2009671 (1st Cir. May 12, 2008). In the context of digital images received or possessed, the concept of knowing whether a given image violates the statutes

versus represents an exercise of a constitutional right is vague. In short, how can a receiver or possessor know this fact by visual examination of a potentially contraband, potentially constitutionally protected image?

This court has previously held that vagueness in this context "is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt." *United States v. Williams*, 128 S.Ct. 1830, 1846 (2008). This conclusion is inapplicable to Paull's argument here.

This is an issue of chronology in a criminal case. Proof beyond a reasonable doubt applies after indictment, arraignment, trial and while a jury is deliberating. Juries, however, do not decide whether defendants lack the capacity required to have a statute applied to their conduct. Juries decide *if a defendant knew* a particular item was or was not contraband. They have no role in deciding whether a defendant had the capacity to form the statutory mens rea.

Paull's argument is set at the time an innocent citizen, with no contraband on his computer, views an image of apparent child pornography just downloaded and must make the decision whether his receipt or possession of that image violates the statutes or represents an exercise of his constitutional right as outlined in *Free Speech*. A citizen in that situation has only two choices: 1. View the image and guess whether it is contraband or constitutionally protected material; or 2. Refuse to download it or anything that "appears to be" contraband. A person guessing cannot know. A statute causing citizens to voluntarily foreclose their constitutional rights to avoid prosecution is

unconstitutional. The determination of Paull's capacity is properly done, as are all other capacity determinations, prior to trial. *Thompson* and *Clark*, supra.

D. The accepted fact of image indistinguishability

The government in 2002 agreed with Paull's argument. The government argued that "[Legal images]...are indistinguishable from [illegal] ones; they are part of the same market and are often exchanged." *Ashcroft v. Free Speech Coalition*, 535 U.S. at 254, 122 S.Ct. at 1404. This court found such images indistinguishable by detailing the inability of image possessors to establish their legality by viewing the images.

"In [child pornography] cases...the evidentiary burden [of determining an image's authenticity] is not trivial. Where the defendant is [a mere possessor] he *may have no way* of establishing the identity, or even the existence, of the actors." *Id.* Emphasis added. This statement implicitly recognizes the futility of visual examination. "If the evidentiary issue is a serious problem for the Government, as it asserts, it will be at least as difficult for the innocent possessor." *Id.* If citizens had the capacity to know items were contraband by visual examination a defendant's evidentiary burden is *trivial* instead of "not trivial." This court in *Free Speech* was describing the problems a charged citizen would have mounting a defense to charges under the CPPA. There is no need to mount such a defense if visual examination solves the riddle of authenticity. The technological reality this court identified in 2002 persists.

"The statute, moreover, applies to work created before 1996, and the producers themselves may not have preserved the records necessary to meet the burden of proof. Failure to establish the defense can lead to a felony conviction." *Id.* Here again, if merely looking at such items was sufficient to establish their legal or illegal nature, there is no need for a producer to "preserve records" as a means to prevent indictment or conviction. Obviously, the court recognized the same technological fact in 2002 as Paull is advancing here. This court's conclusion in 2002 was based upon Congressional testimony and findings from hearings it held in 1996.

The government's leading digital imaging expert, Thomas Musheno, acknowledged under oath that he lacks the capacity to distinguish between contraband content and constitutionally protected content. He testified that "it is possible to alter an image in a manner that is undetectable. [Musheno] testified that because of this, he never opines that an image is real on the basis of a single image. In such cases, he limits his conclusions to 'appears to be real' and no conclusion." *Frabizio* at 7.

The senior judge for the 1st Circuit recently found that persons like Paull lack this capacity:

> Technological advances in recent years have been such that an untrained eye simply cannot easily distinguish a photograph of a real person from a virtual image by merely eyeballing the photographs in question. Indeed, determining whether an image is real or virtually created is not only no longer within the "range of normal experience and knowledge" of the average

> person, but it may also very well be difficult for even experts [to say] whether the pictures were made by using real children or by using computer imaging....*United States v. Wilder* 2008 WL 2009671 (C.A.1) (May 12, 2008).

Scholarly articles by digital imaging experts written, in some cases more than 10 years ago, explain and support this technological truth.

Digital images are easier to manipulate than traditional photographs and digital manipulation is more difficult to detect. *10 Wash. U.J.L. & Pol'y 267* (2002).

> Digital images are highly susceptible to manipulation. ...In fact, users do not even need specialized software to manipulate images; the same programs that allow users to view images or adjust contrast also allow users to cut and paste items with a click of the mouse. * * * The electronic nature of the image file makes undetectable manipulation of a digital image easy, in part because no traditional 'original image' is made. * * * Thus, it is impossible to determine which image is a first generation image and is therefore the 'original.' The lack of an 'original' for comparison with the offered image reduces the opportunity to verify that the image has not been altered or has only been altered in an acceptable manner, thereby increasing the likelihood that changes will not be discovered unless the proponent of the image reveals them. Id.

Furthermore,

> "Congress found that computers and computer imaging technology can be used to '[1] produce ... visual depictions of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the *unsuspecting viewer* from unretouched photographic images of actual children engaging in sexually explicit conduct ... [2] alter sexually explicit photographs, films, and videos in such a way as to make it virtually impossible ... to determine if the offending material was produced using children ....'" *United States v. Fox* (2001), 248 F. 3d 394, citing S. Rep. No. 104-358, at 2 (1996). Emphasis added.

The fact that digital images are much more easily manipulated than traditional photographs has been recognized by the legal community for more than ten years:

> [T]he potential for incredible abuse associated with [digital imaging] is, or should be, troubling to the legal profession in particular. ....It is impossible to tell whether [a digital] image comes directly from a camera or has been enhanced or altered by a computer. This reality has precipitated a steady erosion in the trust of the photographic image over the past decade.
>
> ...[C]omputer manipulation is also more precise than manual retouching [and] the process is virtually undetectable....Computers can alter a [digital image] beyond recognition with detection nearly impossible. *A Picture is Worth a Thousand Lies*, (1992), 18 Rutgers Computer & Tech. L.J. 365.

Law enforcement digital imaging experts and computer experts have concurred with Paull's argument for years now. *U.S. v. Fox*, 248 F.3d 394, 403 (5th Cir.2001) (Government's computer expert conceded that there is no way to know whether a person depicted in a digital image actually exists); *United States v. Ellyson*, 326 F.3d 522, 532 (4th Cir. 2003) (Government's agent testified that he did not know whether some of the digital images possessed by the Defendant and introduced into evidence were created using actual minors or not); *State v. May*, 362 N.J.Super. 572, 829 A.2d 1106, 1111 (N.J.Super.Ct.App.Div.2003) (State's expert conceded his inability to distinguish between an actual minor in a digital image and a digital image of a minor that is created or manipulated using a computer).

There is no support for the claim that Paull or any other citizen is able to reliably determine if they are in possession of the image of an actual minor versus one that is constitutionally protected per *Free Speech Coalition*.

There is no case decision, federal or state, in which any digital imaging expert witness, government or otherwise, has testified that citizens have the capacity to reliably know whether a given digital image is prohibited by the statute versus protected by the First Amendment.

As repugnant as apparent images of child pornography are, this court has protected their possession. *Free Speech Coalition*. That First Amendment protection means nothing if citizens can be punished for possessing items that are later determined by law enforcement to be contraband even

though the citizen lacked the capacity to make that determination themselves.

Even if the court finds the statute is not vague, it is overbroad as it applies to Mr. Paull.

V. 18 U.S.C. 2252 and 2252(A) are unconstitutionally overbroad lacking a scienter requirement punishing both intentional and accidental receipt and possession of child pornographic material regardless of a citizen's intent.

A. Scienter Requirement in Child Pornography Law

Cases such as *New York v. Ferber*, 458 U.S. 747, 765 (1982) ("[C]riminal responsibility may not be imposed without some element of scienter on the part of the defendant"); *Smith v. California*, 361 U.S. 147 (1959); *Hamling v. United States*, 418 U.S. 87 (1974); and *Osborne v. Ohio*, 495 U.S. 103, 115 (1990), suggest that a statute completely bereft of a scienter requirement as to the *age of the performers* would raise serious constitutional doubts. *United States v. X-Citement Video, Inc.* 513 U.S. 64 (1994). Emphasis added.

Likewise, a statute without a scienter requirement as to the reality of the performers is unconstitutional. Meaning, a statute without a scienter requirement requiring the government to prove a citizen intended to receive or possess an image that depicted an actual minor (as opposed to one that merely "appeared to depict" a minor) and that citizen knew that the item he received or possessed depicted an actual minor is unconstitutional.

The statutes in Paull's case lack a necessary scienter requirement.

The statute requires only knowledge, without intent. "[T]he government [is] only required to prove that [defendant] knowingly - not willfully - received or possessed the images." *United States v. Irving*, 452 F.3d 110, 122 (2d Cir. 2006).

The Internet age has been upon us for more than a decade. The reality of that world for citizens is the easy access, via downloading from the Internet, of a range of content including images and videos. Internet users regularly download such content, including contraband, without being able to view it first. 18 U.S.C. 2252(A) and 2252 criminalize this innocent conduct without exception.

A person cannot know the apparent contents of a digital image file until they open it. They may choose not to view it or be unable to view it until they download it. Once downloaded and viewed, under 2252(A) and 2252, the felony is complete. This reality is acknowledged by the statute itself. It includes a limited "safe harbor" provision. See 18 U.S.C. 2252(c). That safe harbor is limited to the possession or receipt of just three images. Once a citizen innocently downloads four or more images, whose apparent content is not discovered until they are opened and viewed on the user's computer, the felony is complete and no excuse extricates them from guilt under the statute.

For traditional crimes of receiving and possessing (such as of drugs or stolen goods), proving knowledge is normally sufficient to establish scienter; you know, before you accept a packet of cocaine or a box off the back of a hijacked truck, that you are committing a crime by

lifting up your arms, receiving, and taking possession. In contrast, defining Internet-facilitated computer "possession" and "receipt" is not so easily understood. The objects, later discovered to be forbidden by law enforcement analysis or comparison to other seized images in prior cases, are bits of data not "known" to be apparent contraband until the files they contain are opened, if ever, by the citizen.

Knowledge of the apparent illegal nature of the contents of the electronic data may be obtained simultaneously with receipt or be acquired later as they are being possessed. Once the contraband is viewed, the citizen knows he has received something appearing to be contraband, even if they never sought or wanted such material. Unintentional or accidental receipt and possession punished by the statute carries steep penalties.

A person seeking legal material and accidentally downloading ten images of apparent contraband content has a classic dilemma. Maintaining possession of those files may violate the statute. Deleting those images is obstruction of justice. (Daniel M. Gitner & Gabrielle S. Friedman, *Must a Firm Report Child Porn on a Company Server*?, N.Y.L.J., Nov. 15, 2007, at 4 ("While there is no explicit 'duty to report' spelled out in a statute, as a practical matter, not reporting means either (a) knowingly hanging on to the images, which is a felony, or (b) destroying the images without telling anyone. While option (b) . . . might sound like a good idea, it is not so simple. Not only is it difficult to completely remove images from a computer, but trying to do so could (and likely will) be interpreted as concealing the felony committed . . . ."). As one FBI agent put it, "One click, you're guilty. A federal offense is that easy." *What to do*?

Steve Silberman, *The United States of America v. Adam Vaughn*, Wired News, Issue 10.10, Oct. 2002, at 3.

Informing law enforcement equals an indictment and prosecution. Despite the inaccessibility of deleted files to the user, most courts have reflexively found deleted files to still be in the possession of the computer user. See *Silberman*, supra, at 3 ("If your computer is searched, even files that have been dragged to the trash or cached by your browser software are counted as evidence. Some offenders have been sent to jail for 'possessing' images that only a computer-forensics technician can see.").

Citizens cannot block or screen illicit images downloaded from the Internet. *United States v. American Library Association, Inc.*, 539 U.S. 194, 221 (2003) (Stevens, J., dissenting).

In *Ashcroft v. American Civil Liberties Union*, Justice Breyer repeated Justice Stevens' concerns:

> Filtering software, as presently available, does not solve the "child protection" problem. It suffers from . . . serious inadequacies that prompted Congress to pass [other] legislation instead of relying on its voluntary use. First, its filtering is faulty, allowing some pornography material to pass through without hindrance . . . . [T]he software alone cannot distinguish between the most obscene pictorial image and the Venus de Milo. No Member of this Court [has] disagreed [with this proposition]. (*Ashcroft v. ACLU*, 542 U.S. 656, 684-86 (2004) (citations omitted) (Breyer, J., concurring in the judgment).

The crime must be clearly defined by the words of the statute since people are entitled to an essential protection of due process: notice of what are criminal acts. See. e.g., *Chicago v. Morales*, 527 U.S. 41, 58 (1999) ("[T]he purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law. 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.'" (quoting *Lanzetta v. New Jersey*, 306 U.S. 450, 453 (1939))); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (vague laws "may trap the innocent by not providing fair warning."); *Markus D. Dubber & Mark G. Kelman, American Criminal Law*: Cases, Statutes, and Comments 107-53 (2005) (The Principal of Legality). If the offense is not defined "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement," the statute may be void for vagueness. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); see also *Grayned*, 408 U.S. at 108; cf. Brief of the National Coalition Against Censorship and the First Amendment Project as Amici Curiae, Supporting Respondent, *United States v. Williams*, 444 F.3d 1286 (11th Cir. 2006), cert. granted, 127 S. Ct. 1874 (2007) (No. 06-694) (concerning 18 U.S.C. 2252A(3)(B)).

This court protected the receipt and possession of images that "appear to be" child pornography. *Free Speech Coalition*. Therefore, citizens can constitutionally download such images, receive and possess them. Because of these statutes, citizens are imperiled to exercise this constitutional right for fear of being prosecuted if they guess wrong as to images that law enforcement later claims are contraband.

The words "and intentionally" in Paull's indictment were surplusage. Once a computer receives an illicit image by any method, whether spam email, intentional downloading, loading of a CD-ROM, file sharing, etc., the computer user possesses "matter" containing child pornography, even before viewing. The images are in the computer and available for viewing. When he intentionally or unintentionally sees the child pornography pictures, the user "knowingly possesses" them - even if the images were unsolicited, unwanted, or a complete surprise. The possession and receipt charges cover purely passive conduct.

Knowing receipt - the key operative element of one of the provisions Paull is charged with violating - does not, by its terms, require illicit action. It does not require seeking the information.

Knowing receipt can be as passive as knowing possession in the computer context. Section 2252 does provide in part for an affirmative defense or "safe harbor" for accidental or unintentional situations:

To require a person who has done nothing a layperson - or a congressperson or a judge - would consider improper to promptly report to the police raises a self-incrimination problem. (See *U.S. Const. amend. V* ("No person . . . shall be compelled in any criminal case to be a witness against himself"). First, he should not have to admit anything. Second, he should not have to admit anything when he has done nothing morally culpable. The "safe harbor" reporting requirement of section 225.[illegible]c) does not cure any statutory defect in a prosecution for receiving or possessing. In fact, from a constitutional point of view, it exacerbates it.

For the typical offense, "an injury can amount to a crime only when inflicted by intention." *Morissette v. United States*, 342 U.S. 246 (1952).

The lack of scienter is a valid overbreadth challenge under the First Amendment. See *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2670 (2007) ("The Government may not suppress lawful speech as the means to suppress unlawful speech."); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S.Ct. 1389 (2002) (entertaining facial challenge to child pornography statute because of a failure to distinguish actual from virtual child); *X-Citement Video, Inc.*, 513 U.S. 64, 78-79; Richard H. Fallon, Jr., et al., Hart and Wechsler's The Federal Courts and the Federal System 170-99 (5th ed. 2003). Because an overly broad statute may chill free speech, which has "transcendent value to all society," *Gooding v. Wilson*, 405 U.S. 518, 521 (1972), and can be enforced in discriminatory ways, see, e.g., *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569, 571 (1987), courts must be attuned to the dangers of criminalizing First Amendment protected activities such as Internet browsing or viewing adult pornography. See *Free Speech Coalition*, 535 U.S. 234, 122 S.Ct. 1389; *X-Citement Video*, 513 U.S. 64; *New York v. Ferber*, 458 U.S. 747 (1982).

The statute as written and charged in the indictment is so broad, ambiguous and devoid of a critical mens rea requirement as to warrant a ruling that it is both unenforceable and unconstitutional. In the computer context the operative element of "knowledge" is not enough to infer evil intent; virtual strict liability applies. When accidental or unsought receipt and possession of electronic files via the Internet can occur readily, the statute's "knowledge" requirement is insufficient to

protect against due process violations. "Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.'" *Grayned*, 408 U.S. at 109 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)).

Paull respectfully requests this court accept this case to resolve the obvious constitutional problems with these statutes.

CONCLUSION

That the issues presented herein raise issues not previously addressed by this Court and that current precedent from this Court has been read differently by individual courts is evidence that reasonable jurists differ as to there determinations. Respectfully, this Court should intervene and explicitly answer the questions herein presented. Accordingly, the Appellant moves this Honorable Court for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 07-3482

[Filed January 9, 2009]

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,	)
v.	)
JERRY PAULL, *Defendant-Appellant.*	)

Appeal from the United States District Court for the Northern District of Ohio at Cleveland. No. 05-00246—Donald C. Nugent, District Judge.

Argued: October 23, 2008

Before: BOGGS, Chief Judge; and MERRITT and GRIFFIN, Circuit Judges.

COUNSEL

ARGUED: Dean Boland, Lakewood, Ohio, for Appellant. Michael A. Sullivan, ASSISTANT UNITED STATES ATTORNEY, Cleveland, Ohio, for Appellee.

ON BRIEF: Dean Boland, Lakewood, Ohio, Kevin M. Cafferkey, LAW OFFICES, Cleveland, Ohio, for Appellant. Dean M. Valore, ASSISTANT UNITED STATES ATTORNEY, Cleveland, Ohio, for Appellee.

BOGGS, C. J., delivered the opinion of the court. GRIFFIN, J. (pp. 19-23), delivered a separate opinion concurring in part and dissenting in part. MERRITT, J. (pp. 24-27), delivered a separate dissenting opinion.

OPINION

BOGGS, Chief Judge. Jerry Paull was convicted pursuant to a conditional plea agreement on four counts of knowing possession of child pornography under the Child Pornography Protection Act, 18 U.S.C. § 2252 *et seq*. and sentenced to imprisonment for 210 months. He now appeals both his conviction and sentence. He claims that the district court ruled improperly on a variety of pre-trial motions, including his motions to suppress for violations of his Fourth Amendment and *Miranda* rights, and his motions to dismiss the indictment because the statute is void for vagueness and because it deprived him of a fair trial. He also appeals his sentence, claiming that the district court incorrectly calculated his guideline range and abused its discretion in failing to vary downward in light of his efforts at rehabilitation and his poor health. For the reasons discussed below we affirm Paull's conviction and his sentence.

I. Factual & Procedural History

In 2004, Special Agent Hagan of Immigration and Customs Enforcement (ICE) became aware, through multiple investigations of websites known to traffic in

images of child pornography, of Jerry Paull's online activity involving child pornography. In June of that year, Hagan obtained a search warrant for Paull's Amherst, Ohio residence based on an affidavit detailing Paull's subscriptions to websites containing advertising with images of child pornography and her experience as an investigator of child pornography. While executing the warrant, Agent Hagan informed Paull that he was not under arrest and that the officers were there only to execute the warrant. She asked whether he was willing to explain his "side of the story" but Paull declined to speak with her. She thereafter left him under supervision of a local officer and joined the search. Conversation in passing between Paull and the searching officers continued but there was no subsequent discussion regarding the search or the suspected crime.

In the course of the search, officers found a garbage can in the garage with "a number of double and triple bagged bundles" in it. In those bundles "there were printed images of child pornography" and "a number of floppy disks, a number of CDs, videotapes, as well as a number of computer printouts of Mr. Paull's." The collection of child pornography totaled over 3,700 images, not including the video tapes. Agent Hagan took this evidence from the garage into the kitchen and laid it on the table in front of Paull, telling him that she no longer needed "to talk with [him] because . . . [she] had the evidence there" and then left the kitchen. Paull immediately requested to speak with her and she returned to the kitchen.

Before Paull made any statement, Agent Hagan advised him again that he was not under arrest. She nevertheless informed him of his *Miranda* rights and

gave Paull a statement and waiver of those rights, which he read and signed. He proceeded to give an oral statement taking responsibility for "all the items that were in the garage [and admitting] that they contained child pornography." He subsequently provided a written statement that memorialized his confession and explained his history of involvement with child pornography.

Paull was ultimately indicted on four counts of possession of child pornography under § 2252A(a)(2). Paull made a number of pre-trial motions, all of which the district court denied. First, he moved to suppress the evidence found under the Fourth Amendment. Paull argued that the search violated his Fourth Amendment rights because the warrant was based on an insufficient affidavit, and was overbroad. The court held that there was probable cause to search the entire premises based on the type of evidence and crime involved even considering the delay between the gathering of the warrant evidence and the search. In the alternative, the court held that there was "a good faith basis that the officers believe[d] that the magistrate was correct" and, therefore, the search fit within the exception of *United States v. Leon*.

Second, Paull argued that his confessions were obtained in violation of the *Miranda* rule. Both Paull and Mrs. Paull had testified that, after the initial conversation with Hagan, Paull was interrogated by multiple officers throughout the two-hour search, and that in response repeatedly requested legal counsel. The executing police officers testified to the contrary, claiming that there was no repeated interrogation and Paull never asked for counsel. The district court decided the credibility issue in favor of the officers,

describing Paull's testimony as "completely not believable" and Mrs. Paull's testimony as "completely unbelievable." Even if the credibility issue came out the other way, the court held that the interaction was non-custodial because the police tactics were merely reasonable measures to ensure officer safety and did not rebut the presumption that conversations in the home are non-custodial.

Paull also moved to dismiss the indictment based on a vagueness challenge to § 2252 and his allegations that his right to a fair trial was violated. The district court rejected both as meritless.

Having failed to obtain suppression of the evidence against him or a dismissal of the charges, Paull entered a conditional plea of guilty on all four counts of the indictment, reserving his right to appeal any rulings on pre-trial motions and his eventual sentence. The agreement stipulated to an applicable offense level of 30, which included several enhancements based on the circumstances of the crime (enhancements of two levels for images containing a prepubescent minor, four levels for images portraying sadistic/masochistic conduct; two levels for the use of computer; and five levels for the possession of over 600 illegal images). The agreement also left open the possibility of additional reductions or enhancements to this agreed-upon offense level. To that end, the Pre-Sentence Investigation Report recommended two additional enhancements: two levels for obstruction of justice under U.S.S.G. § 3C1.1 and five levels for a pattern of activity involving the sexual abuse of a minor under U.S.S.G. § 2G2.2(b)(5). The report also recommended against a downward adjustment for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(a) because

of Paull's obstruction of justice. The addition of these adjustments yielded an offense level of 37 and a guideline range of 210 to 262 months of imprisonment.

At the sentencing hearing, the district court made findings of fact and adopted the report's recommendations. First, the court held that Paull had not demonstrated sufficient acceptance of responsibility to support a reduction because he only cooperated when it was in his best interest and because his behavior supported an obstruction of justice enhancement.

Indeed, the court held that two courses of behavior supported the upward adjustment for obstruction of justice. The court's credibility determination at the suppression hearing supported a finding that Paull perjured himself in giving his version of events. The court concluded that "it's pretty clear to me based on my observation of his demeanor and other testimony that was given at that hearing that he testified falsely." The court also found Paull had consistently "wiped the computer for the reason . . . that he could be caught possessing this material . . . ."

Third, the court held that the evidence supported the adjustment for a pattern of activity involving the sexual abuse of a minor. The court based this enhancement on allegations from Andrew Barry, a friend of Paull's son, that during the early and mid-80s, Paull molested him. The court relied on a letter sent from Barry to the United States Attorney's office and testimony from the probation officer assigned to the case that recounted telephone interviews with Barry and several of his family members and concluded the allegations were credible. The court

rejected Paull's argument that only "live testimony from Andrew Barry" should be used.

The district court then sentenced Paull to 210 months in prison, the bottom of the guideline range for an offense level of 37. In doing so, the court rejected Paull's argument for downward variances based on his poor health, his on-going rehabilitation, and his own history of child sexual abuse. The court explained that "your age, your health, your lack of a criminal history under [18 U.S.C. §] 3553 are factors that the Court must and I have considered. I also consider the fact that there's mandatory minimum sentences in this case that are required." But in addition, § 3553 requires "taking into consideration the information . . . about what happens to the victims . . . ." The court emphasized that Paull demonstrated no "empathy, emotion, sorrow, compassion for those children, those thousands of children that are put in this position by people in a place of trust." The court concluded that because the § 3553(a) factors point in opposite directions, "the only fair thing to do is to sentence you within the guidelines."

II. Pre-Trial Motions[1]

A

Paull advances two Fourth Amendment theories under which the district court erred in denying his motion to suppress the evidence seized from his home. Paull first argues that the warrant did not establish probable cause because, in his view, the affidavit relied on events that were "at least thirteen months [after] the last time the accused subscribed to the suspect

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[1] There is some dispute over whether we have jurisdiction to hear the appeal on issues beyond sentencing. Paull's Notice of Appeal is not a model of clarity, stating: "[T]he Defendant . . . hereby gives Notice of Appeal . . . from the sentencing . . . on the questions of law and fact on the above entitled cause entered by the said district court in its sentencing of defendant on April 5, 2007." On one view, this limits the issues on appeal to only the designated sentencing issue. *See McLaurin v. Fischer*, 768 F.2d 98, 101-02 (6th Cir. 1985). But the better reading, in light of the fact that, as the Notice indicates, "counsel was advised . . . to file a Notice of Appeal in a timely manner without the Judgment and Commitment Order, which, to date, has not been journalized," is that this is a generalized notice of appeal sufficient to give us jurisdiction over Paull's entire appeal. This broader reading is confirmed by the Notice's second paragraph beginning "[t]he appeal will also challenge . . . the legality of the sentence" -- language that would not make sense unless Paull intended to challenge the conviction and pre-trial orders as well. Moreover, our circuit has avoided "overly technical reading[s]" of the notice of appeal requirement, *Caudill v. Hollan*, 431 F.3d 900, 904 (6th Cir. 2005), in an effort to apply the principle that "[a] mistake in designating the judgment appealed from is not always fatal, so long as the intent to appeal . . . can fairly be inferred . . . and the other party was not misled or prejudiced." *Sanabria v. United States*, 437 U.S. 54, 68 n.21, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978). Thus, we have jurisdiction to review both the pre-trial and sentencing portions of Paull's appeal.

website . . . ." The district court held that the affidavit was sufficient as a matter of law, and, in the alternative, that even if probable cause was lacking, evidence should not be suppressed because the search was in good faith within the meaning of *United States v. Leon*. We review both of these conclusions *de novo*. *United States v. Kincaide*, 145 F.3d 771, 779 (6th Cir. 1998).

As a general matter, Paull is correct that an affidavit must allege "facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time." *Sgro v. United States*, 287 U.S. 206, 210 (1932). But that principle alone does not demand suppression in this case. Instead, "[t]he expiration of probable cause is determined by the circumstances of each case and depends on the inherent nature of the crime." *United States v. Hython*, 443 F.3d 480, 485 (6th Cir. 2006) (citing *Sgro*, 287 U.S. at 210-11).

Applying this approach to child pornography, we have reasoned that because the crime is generally carried out in the secrecy of the home and over a long period, the same time limitations that have been applied to more fleeting crimes do not control the staleness inquiry for child pornography. *See United States v. Wagers*, 452 F.3d 534, 540 (6th Cir. 2006) ("[E]vidence that a person has visited or subscribed to websites containing child pornography supports the conclusion that he has likely downloaded, kept, and otherwise possessed the material."). This approach to staleness in child pornography cases comports with the practice of other circuits. *See, e.g., United States v. Martin*, 418 F.3d 148, 157 (2d Cir. 2005); *United States v. Froman*, 355 F.3d 882, 890-91 (5th Cir. 2004).

Indeed, in a case similar to Paull's the Ninth Circuit affirmed the denial of a motion to suppress because "the nature of the crime . . . provided good reason to believe the computerized visual depictions [of child pornography] downloaded by [the defendant] would be present in his apartment when the search was conducted ten months later." *United States v. Lacy*, 119 F.3d 742, 746 (9th Cir. 1997) (internal quotation marks omitted).

The affidavit in this case alleged that Paull subscribed to child pornography websites and that he continued to do so over the course of two years. Paull argues that these allegations are too generalized and remote to provide probable cause against him at the time of the search. But he does not dispute that the affidavit alleges that he was subscribing and downloading images from multiple sites. This makes the habits of similarly situated consumers of child pornography relevant. *See Lacy*, 119 F.3d at 746 n.6 ("The affidavit in this case contained sufficient evidence that [the defendant] had downloaded computerized visual depictions of child pornography to provide a foundation for evidence regarding practices of possessors of such pornography."). For instance, one of the websites to which Paull subscribed was described as an "online sharing-community" that was "created specifically for sharing child pornography collections." The affidavit's expert description of the barter economy in child pornography provides context for that subscription: Paull was likely involved in an exchange of images and he therefore is likely to have a large cache of such images in order to facilitate that participation. Moreover, while Paull last purchased a subscription thirteen months prior to the search, the record is silent regarding how long it was for or

whether it had indeed expired at the time of the search. *Cf. Wagers*, 452 F.3d at 538-39 (upholding probable cause despite all three of the defendant's website subscriptions having lapsed prior to the government investigation). In light of the nature of the crime, these allegations are sufficient to establish a fair probability of on-going criminal activity.

In any case, even if the affidavit did not support probable cause, it fits comfortably within the *Leon* good-faith exception, which allows admission of evidence "seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective." *United States v. Leon*, 468 U.S. 897, 905 (1984). Paull argues that the affidavit's generalities make it "bare bones" and therefore ineligible for this exception, but our cases on point hold that even where an officer's experience provides too little evidence to establish probable cause, it suffices to make the affidavit not bare bones by providing a reasonable connection between the defendant and the alleged crime. *See United States v. Schultz*, 14 F.3d 1093, 1098 (6th Cir. 1994) ("[A]lthough we have held [an affiant's] training and experience were not sufficient to establish a nexus of probable cause . . . the connection was not so remote as to trip on the 'so lacking' hurdle."). To the extent that one is persuaded that there are gaps in the evidence caused by the delay between the investigation and the search, they were filled in by Agent Hagan's experience, whose familiarity with consumers of child pornographers gave her adequate reason to suspect that Paull continued to possess illegal images. That is sufficient for a seizing officer to have relied on the warrant in good faith.

Next, Paull argues that the search warrant was "overbroad" because it permitted the search of his garage in addition to the residence. This argument fails because it assumes, without authority, that a garage is presumptively excluded from a valid warrant to search a house. Our law presumes the opposite, that "a warrant for the search of a specified residence or premises authorizes the search of auxiliary and outbuildings within the curtilage." *United States v. Watkins*, 179 F.3d 489, 505 (6th Cir. 1999) (Boggs, J. concurring) (collecting cases). To be sure, there are cases similar to those described in *United States v. Ross* where "probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase." 456 U.S. 798, 824 (1982). But this case is not such a case. In a case like Paull's, where the evidence sought includes images that the defendant likely wants to keep secret, even from his wife, and can easily be concealed in storage in a garage or basement, a reasonable search includes those areas. *See Watkins*, 179 F.3d at 506 ("[T]he weight of the authority is clear that when searching for small portable items such as drugs and records, there is no need to provide separate probable cause or identification of auxiliary structures."). In other words, if there was probable cause to believe Paull possessed child pornography at his residence, there was probable cause to search in the most likely hiding places.

B

Paull argues that both his oral and written confessions were obtained in violation of his *Miranda* rights and therefore should have been suppressed. Because the district court's resolution of this issue

involved rejecting Paull's version of events, he must demonstrate both that the district court's factual conclusions were in error and that its legal holding was wrong. We review the factual question for clear error and the legal question *de novo*. *See United States v. Foster*, 376 F.3d 577, 583 (6th Cir. 2004).

Paull makes no attempt to demonstrate that the district court clearly erred in crediting the officers' testimony. Paull only repeats his insistence that his testimony (and his wife's corroboration) that he was questioned during the search and that, during these interrogations, he repeatedly requested a lawyer should be believed. Having no new reason now, reviewing a cold transcript under a deferential standard, to revisit the district court's conclusions, we will not displace the district court's findings that the Paulls were not credible and that the officers' version was the truthful one. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."); *United States v. White*, 270 F.3d 356, 366 (6th Cir. 2001) (upholding district court factual findings because district court credited officer testimony over the appellant's). On that view of the evidence, the officers asked Paull only once for an interview and, after he declined, they had no substantive conversations with him until he offered to make a statement and never requested a lawyer. Absent a claim he was interrogated or asked for an attorney, there can be no *Miranda* violation.

C

Paull claims that the intersection of prosecutorial discretion and the harshness of 18 U.S.C. § 2252A would have denied him a fair trial in violation of his Due Process and Sixth Amendment rights. This argument is premised on the fact that the statute has no explicit exception for those who possess or view illegal images in connection with a trial defense and, therefore, any expert (or counsel) would necessarily violate the law (and chance prosecution) by undertaking an analysis of the images. For example, Paull argues that a defendant wishing to put on a defense that the images he possessed were not illegal photographs but legal digitally generated images could not do so because no expert capable of distinguishing the images would be willing to undertake the attendant risk of prosecution. Worse, Paull argues, the government's experts are inoculated from this risk by prosecutorial discretion. In light of this alleged handicap to his defense, Paull concludes that he should not be tried at all for his possession of child pornography.

Paull, however, makes no allegations that the government used the law to disrupt his defense or that any specific expert witness would not cooperate. Nor does he show that, if this had been the case, he could not have asked the district court for relief short of dismissal. *See United States v. Miller*, 2007 U.S. Dist. LEXIS 4332 at * 12-13 (N.D. Ohio Jan. 22, 2007) ("There is no indication that defendant has been deprived of the content of the actual images charged. Nor is there any persuasive argument as to why a limited protective immunity order could not be issued in this matter."); *United States v. Halter*, 2006 U.S.

Dist. LEXIS 54276 at *9-10 (N.D. Ohio March 31, 2006) ("The Court conferred with counsel on this very issue prior to trial and the United States proposed that the [illegal] images be made available for Defense counsel's review, subject to a protective order, with the supervision of the FBI."). Indeed, the state court decision Paull cites as authority for this fair trial argument proves this point: the court dismissed the charges under the Ohio child pornography statute because "the Defendant . . . may be prosecuted by the Federal Government. The Court feels that would be the preferable outcome" because a federal court could try the case "without running the risk that the Defense expert would find himself indicted for the possession of this material." *State v. Drady*, Case No. 2004-CR-349 at 8 (Ohio Court of Common Pleas 2004). Paull was tried in a federal court and could have worked with the district court and the government to ensure that he could put on the defense he wanted. But he chose not to. There was no violation of Paull's right to a fair trial.

D

Paull's final pre-trial argument was that § 2252 *et seq*. is unconstitutionally vague because "he lacks the capacity to know whether the charged items contain actual minors" or virtual images of simulated child pornography protected under *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). This argument fails because it misapprehends the void for vagueness doctrine. "Vagueness doctrine is an outgrowth not of the First Amendment but of the Due Process Clause of the Fifth Amendment. A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary

intelligence fair notice of what is prohibited, or is so standardless that it authorizes discriminatory enforcement." *United States v. Williams*, 128 S. Ct. 1830, 1845 (2008). These due process origins mean that "[w]hat renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminancy of precisely what that fact is." *Williams*, 128 S. Ct. at 1846. Thus, in *Williams*, the Supreme Court described the lower court's "error [as] . . . fundamental" because it focused on the fact it may generate close cases and not the statute's sufficiently clear description of the prohibited conduct. *Ibid.*

Paull makes the same fundamental error in asking us to invalidate the Child Pornography Prevention Act. He does not argue that a person cannot read the statute and determine what is illegal; instead he argues that, knowing what is illegal, he cannot distinguish between the prohibited and the permitted. Such an inability to determine whether a crime has been committed "is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt." *Williams*, 128 S. Ct. at 1846. The government provides a helpful analogy: "A defendant in a drug case could use [the] same logic to argue the drug statutes are unconstitutionally vague because he could not know at the time of purchase whether he was buying authentic cocaine." Appellee's Br. at 54. Like the drug messenger arguing the substance he possessed was not real drugs, Paull's refuge from illegal prosecution is not the constitution but putting the government to its burden to prove that he possessed child pornography.

III. Sentencing

In reviewing federal sentences after *Booker*, "the question in the end is whether the district court abused its discretion." *United States v. Grossman*, 513 F.3d 592, 595 (6th Cir. 2008) (citing *Gall v. United States*, 128 S. Ct. 586, 597 (2007)). This review for abuse of discretion proceeds in two dimensions. The first ensures "that the district court committed no significant procedural error." *Gall*, 128 S. Ct. at 597. The second considers "the substantive reasonableness of the sentence imposed." *Ibid.* Paull alleges errors in both dimensions and we take each in turn.

A

Paull charges the district court with three errors in calculating his offense level: the district court should not have enhanced his sentence for obstruction of justice; the district court should not have enhanced his sentence for a pattern of activity involving the sexual abuse of a minor; and the court should have reduced his sentence for acceptance of responsibility. When reviewing such procedural errors, our circuit defers to the sentencing court's factual determinations unless clearly erroneous but reviews interpretations of the guidelines *de novo*. *United States v. Davidson*, 409 F.3d 304, 310 (6th Cir. 2005).

First, the application of the enhancement for obstruction of justice under U.S.S.G. § 3C1.1 was proper in this case. A finding of specific acts of perjury supports this enhancement. *See United States v. Lawrence*, 308 F.3d 623, 632 (6th Cir. 2002) ("[A] district court's findings will be adequate if: 1) the record is sufficiently clear to indicate which

statements the district court consider perjurious; and 2) the district court found that the statements satisfied each element of perjury."). The district court made such a finding here:

> I had to make a judgment whether the officers testified truthfully and/or whether Mr. Paull was testifying falsely when he accused them of lying. It was very clear to me, because he signed statements at the time of his arrest, that no promises of any leniency of any kind were made . . . and so either he lied then or lied during his testimony . . . And it's pretty clear to me based on my observation of his demeanor, and the other testimony that was given at the hearing that he testified falsely.

Like Paull's argument for reversal on the *Miranda* issue, his claim here that his testimony was truthful and the officers were lying simply reasserts his trial court insistence that he testified truthfully despite the express holding that he did not. And, again, this assertion is without support in the record and does not demonstrate clear error. *Anderson*, 470 U.S. at 574. Accordingly, the district court did not err in finding he committed perjury. On this record, enhancing Paull's total offense level by two under U.S.S.G. § 3C1.1 was appropriate.[2]

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[2] Because either basis could have supported the enhancement independently, there is no need to consider the district court's alternative conclusion that "wiping" a computer was sufficient. We note, however, that Paull's behavior probably did not support the enhancement because he did not *know* that he was under investigation when he "wiped" his computer. *See United States v. Brown*, 237 F.3d 625, 628 (6th Cir. 2001) ("The obstruction

Second, the five-level enhancement under U.S.S.G. § 2G2.2(b)(5) for a pattern of activity involving sexual abuse or exploitation of a minor was appropriate. Paull insists that the facts were legally insufficient to support the district court's holding.[3] The letter from Barry detailing the abuse, however, makes specific allegations, including when the activity started, the time of day and year (evenings during football and basketball season, when Paull would be free from his other family members), and was corroborated by family members of the victim. Paull argued at sentencing that he was always at those basketball and football games to watch his son perform in the high school band and provided the court with letters from family friends indicating that Paull attended all of his son's events. Evidently, the district court credited Barry's specifics over Paull's generalities. But, regardless, disputed facts do not make evidence insufficient and Paull offers no reason why it would be clear error to find that, by a preponderance of the evidence, Paull did molest Barry.

Paull's arguments also imply that basing the enhancement on hearsay evidence at all was error. The

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adjustment applies where a defendant engages in obstructive conduct with knowledge that he or she is the subject of an investigation or with the correct belief that an investigation of the defendant is probably underway.").

[3] Paull also argues that the supporting facts should have been found beyond a reasonable doubt. This is foreclosed by previous decisions because "[t]his court has squarely rejected defendants' contention that *Booker* and *Blakely*[] require all factual finding affecting a sentence's severity to be made by a jury beyond a reasonable doubt." *United States v. Sexton*, 512 F.3d 326, 329-30 (6th Cir. 2008).

district court's reliance on Barry's letter without live testimony from Barry is clearly permissible under our law. *See United States v. Silverman*, 976 F.2d 1502, 1511 (6th Cir. 1992) (en banc) ("So long as the evidence in the presentence report bears some minimal indicia of reliability in respect of defendant's right to due process, the district court . . . may . . . consider and rely on hearsay evidence without any confrontation requirement.") (internal quotation marks omitted). While recent developments in sentencing and Confrontation Clause jurisprudence "may be a broad signal of the future, there is nothing specific in *Blakely*, *Booker* or *Crawford* that would cause this Court to reverse its long-settled rule of law that [the] Confrontation Clause permits the admission of testimonial hearsay evidence at sentencing proceedings, "and so we will "continue to observe [our] precedent that testimonial hearsay does not affect a defendant's right to confrontation at sentencing." *United States v. Katzopoulos*, 437 F.3d 569, 576 (6th Cir. 2006).

We underscore that this cautious approach to a changing area of law is the proper result of following our precedent. *Crawford* dealt only with the content of *what* the Confrontation Clause requires and not the scope of *when* it applies. *Silverman*, on the other hand, rested on the proposition that the Confrontation Clause does not regulate information relied on in sentencing and not that the clause applied but it nevertheless permitted the use of hearsay. *See Silverman*, 976 F.2d at 1508 (explaining that despite the guidelines' alteration of sentencing considerations, "the permissible methods of informing the sentencing judge and the need for information in fashioning sentences in light of the constitutional rights of

defendants at sentencing have not essentially changed. The standard has always been that . . . specific procedures, such as are required at trial, are simply not constitutionally mandated . . . ."). The rule in *Crawford* thus does not affect the basis for *Silverman*. *See United States v. Stone*, 432 F.3d 651, 654 (6th Cir. 2005) ("Because *Crawford* was concerned only with testimonial evidence introduced at trial, *Crawford* does not change our . . . rule that the confrontation clause does not apply in sentencing proceedings."); *United States v. Kirby*, 418 F.3d 621, 627-28 (6th Cir. 2005) (holding that *Crawford* does not affect admissibility of hearsay in hearings regarding the revocation of supervised release).

This approach of leaving *Crawford's* Confrontation Clause rule where it is found has been adopted by every court of appeals to consider the decision's implication for hearsay in sentencing hearings.[4] *See United States v. Beydoun*, 469 F.3d 102, 108 (5th Cir. 2006) ("[T]here is no *Crawford* violation when hearsay testimony is used at sentencing, rather than at trial."); *United States v. Cantellano*, 430 F.3d 1142, 1146 (11th Cir. 2005) ("*Crawford* dealt with trial rights and we see no reason to extend *Crawford* to sentencing proceedings. The right to confrontation is not a

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[4] The Eleventh Circuit has extended Confrontation Clause rights to death penalty cases but that extension occurred long before *Crawford* and was not altered by the Supreme court's recent decisions. *See United States v. Brown*, 441 F.3d 1330, 1361 n.12 (11th Cir. 2006) ("We have held that *Crawford* does not apply in the context of non-capital sentencing. However, death is different, and we have held . . . that the constitutional right to cross-examine witnesses applies to capital sentencing hearings.") (internal citations omitted).

sentencing right."); *United States v. Roche*, 415 F.3d 614, 618 (7th Cir. 2005) (holding *Crawford* does not bar hearsay in sentencing because "the relevant provision at sentencing is the Due Process Clause, not the confrontation clause . . . ."); *United States v. Luciano*, 414 F.3d 174, 178 (1st Cir. 2005) ("Nothing in *Crawford* requires us to alter our previous conclusion that there is no . . . Confrontation Clause right at sentencing."); *United States v. Martinez*, 413 F.3d 239, 243 (2d Cir. 2005) ("Neither *Crawford* nor *Booker* . . . addressed the applicability of the right of confrontation to the sentencing context . . . nor did [they] so undermine the rationale of Second Circuit precedent involving the consideration of hearsay testimony at sentencing . . . .").

Third, Paull does not show that the district court erred in refusing to apply a two-level reduction for the acceptance of responsibility because of Paull's obstruction of justice. In cases such as Paull's where a defendant's plea counsels for a reduction but his behavior does not, the guideline's application note explains "[c]onduct resulting in an enhancement under § 3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility. There may, however, be extraordinary cases . . . ." U.S.S.G. § 3E1.1, cmt. n.4. In implementing this "extraordinary case" exception to the proposition that obstructing justice demonstrates a lack of acceptance, we have "consistently granted district courts great leeway when making this determination," *United States v. Roberts*, 243 F.3d 235, 241 (6th Cir. 2001) (collecting cases), and held that "the defendant has the burden of proving the extraordinary nature of his or her case," *United States v. Jeross*, 521 F.3d 562, 582 (6th Cir. 2008). Here,

Paull makes no argument why his obstruction is not a run-of-the-mill case. Instead, he continues to rely on the very testimony the district court held perjurious in his suppression argument before this court, without making any new good faith argument that the district court erred in its credibility and factual findings. *Cf. United States v. Gregory*, 315 F.3d 637, 640-41 (6th Cir. 2003) (holding a defendant is not "entitled to an adjustment for acceptance of responsibility" where the obstruction is "on-going."). On this record, Paull has not demonstrated the district court was acting impermissibly in refusing the reduction.

B

Paull further claims that the sentence was substantively unreasonable. Our circuit takes a deferential approach to this type of substantive sentencing challenge. *See United States v. Vonner*, 516 F.3d 382, 392 (6th Cir. 2008) (en banc) ("[T]he central lesson [of recent Supreme Court activity is] that district courts . . . deserve the benefit of the doubt when we review their sentences and the reasons given for them."). This is especially true in cases, like Paull's, where the district court agrees with the recommendations in the sentencing guidelines. In such cases "this court has embraced an appellate presumption of reasonableness" that the defendant must rebut. *Id.* at 389.

Paull attempts to do so with two arguments. First, he alleges that the sentence is greater than necessary to serve the purposes of § 3553(a). Second, he argues that the district court over-emphasized the impact on victims and inappropriately discounted factors that weighed for a downward variance. Taken in concert

and at full face value these claims make at least a plausible argument that the presumption has been rebutted: Paull is an old and sick man who has been extraordinary in his attempts to rehabilitate himself and but for the district court's over-emphasis on the impact on the victims he should have received a lighter sentence. The record, however, also contains material that belies this characterization of the considerations relevant to Paull's sentencing. The district court's summary illustrates the competing factors:

> Now, I could vary up, and that's something I considered in this case due to the nature of the volume and the number of images you had and the extent of what you did, or I could vary down because of your age, your health, and your lack of criminal background and, in fact, the things that you've done since your arrest to try to prevent yourself from ever engaging in this type of conduct.
>
> But I want you to know I've taken all of that into consideration, and I think the only fair thing to do is sentence you within the guidelines.

Far from being impermissible or inadequate, this analysis of the considerations the court found most important – the defendant's circumstances and the seriousness of the crime – is just the sort of balancing a sentencing court should be doing. *See, e.g., United States v. Duane*, 533 F.3d 441, 453 (6th Cir. 2008) (upholding a within-guidelines sentence as substantively reasonable where "the district court clearly considered the § 3553(a) factors that it found most pertinent – namely the seriousness of the crime,

the need for deterrence and the guidelines range."). Indeed, this is what is meant by the "on-the-scene assessment of the competing considerations" to which we are to defer. *United States v. Grossman*, 513 F.3d at 596.

More broadly, we cannot say, in light of our deferential review, that the sentence of 210 months of imprisonment was unreasonable. It is at the lower end of the guidelines range and accurately reflects both the reasons to vary downward and the severity of Paull's offense. *See Vonner*, 516 F.3d at 390. To be sure, there are reasons here – as in any sentencing case – to be sympathetic to the defendant. Paull is a former minister who has admirably worked with a sex addiction group at rehabilitating himself and others, and the combination of his age, his various health problems, and the length of his sentence mean he almost certainly will die in jail or shortly after his sentence expires. But our role as an appellate court is not "to impose sentences in the first instance or to second guess the individualized sentencing discretion when it appropriately relies on the § 3553(a) factors . . . ." *United States v. Davis*, 537 F.3d 611, 618 (6th Cir. 2008). Indeed, we routinely uphold the sentences of sick defendants, *e.g. United States v. Johnson*, 239 F. App'x 986, 992 (6th Cir. 2007) (unpublished decision), and the sentences of rehabilitated defendants, *e.g. United States v. Monday*, 218 F. App'x 419, 424 (6th Cir. 2007) (unpublished decision), over their appeals for a variance. This is because we are reviewing for unreasonable sentences, not sympathetic defendants. Defendants such as Paull are sentenced only after their crime, the *actual* possession of images of *actual* young children depicting *actual* sexual abuse has been proven or they, as in Paull's case, have

admitted to guilt, pursuant to a constitutionally prescribed process designed to guard against erroneous conviction.

Under these circumstances, it seems to me that the dissent's suggestion that such convictions "border[] on" "the thousands of witchcraft trials and burnings conducted in Europe and here from the Thirteenth to the Eighteenth Centuries" cannot be maintained, without some risk of terminological inexactitude.

IV. Conclusion

The judgment of the district court is therefore AFFIRMED.

CONCURRING IN PART, DISSENTING IN PART

GRIFFIN, Circuit Judge, concurring in part, and dissenting in part. I would hold that we lack jurisdiction to decide issues unrelated to defendant Paull's sentence. Thus, for the reasons expressed below, I disagree and respectfully dissent from footnote 1 of the lead opinion. However, assuming arguendo our jurisdiction regarding all issues, I join the remainder of the Chief Judge's opinion.

In his appellate brief, defendant Paull challenges various pretrial rulings, asserts that he was denied a right to fair trial, contends that the statute on which his conviction was based is unconstitutionally vague, and appeals his sentence. Defendant's notice of appeal, however, unambiguously requests review of his sentence only:

> Now comes the Defendant, Jerry Paull, by and through his attorney, Kevin M. Cafferkey, who hereby gives Notice of Appeal to the United States Court of Appeals for the Sixth Circuit from the sentencing of the United States District Court on the questions of law and fact on the above entitled cause entered by the said district court in its sentencing of defendant on April 5, 2007. To preserve defendant's right to appeal, counsel was advised on Monday, April 16, 2007 to file a Notice of Appeal in a timely manner without the Judgment and Commitment Order, which, to date, has not been journalized for the docket in this case.
>
> The appeal will also challenge, pursuant to Title 18, U.S.C. 3742(a), the legality of the sentence, to wit: That said sentence was unreasonable and was greater than necessary to comply with the purposes of sentencing as provided for in 18 U.S.C. 3553, et seq. and was in violation of law, and/or was the result of an incorrect application of the Sentencing Guidelines and/or is greater than the sentence specified in the applicable guideline range.

Given the sole basis for his appeal and the broader issues raised in defendant's appellate brief, we are confronted with the threshold question of jurisdiction. "An appellate court has a duty to consider sua sponte whether appellate jurisdiction is properly invoked." *Mattingly v. Farmers State Bank*, 153 F.3d 336, 336 (6th Cir. 1998). Rule 3(c)(1)(B) of the Federal Rules of Appellate Procedure requires that the notice of appeal "designate the judgment, order, or part thereof being appealed." The Supreme Court has stated that "Rule

3's dictates are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review." *Smith v. Barry*, 502 U.S. 244, 248 (1992). Consistent with the Supreme Court's directive, we have stated that the requirements of Rule 3 are "mandatory and jurisdictional in nature," *Isert v. Ford Motor Co.*, 461 F.3d 756, 759 (6th Cir. 2006), and that this court cannot waive them. *Martin v. Gen. Elec. Co.*, 187 F. App'x 553, 557 (6th Cir. 2006) (citing *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 (1988)). By enacting this provision, "Congress has limited this Court's appellate review to issues designated in the notice of appeal." *United States v. Glover*, 242 F.3d 333, 335 (6th Cir. 2001). Accordingly, if an appellant "chooses to designate specific determinations in his notice of appeal – rather than simply appealing from the entire judgment – only the specified issues may be raised on appeal." *McLaurin v. Fischer*, 768 F.2d 98, 102 (6th Cir. 1985). *Accord United States v. Univ. Mgmt. Servs., Inc.*, 191 F.3d 750, 756 (6th Cir. 1999); *Caldwell v. Moore*, 968 F.2d 595, 598 (6th Cir. 1992) ("[W]here a notice of appeal specifies a particular order, only the specified issues related to that order may be raised on appeal."); *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 516 (6th Cir. 1991); *United States v. Pickett*, 941 F.2d 411, 415 n.3 (6th Cir. 1991) ("An appellant waives any appeal to a portion of a judgment not mentioned in his notice of appeal if he chooses to designate specific determinations in his notice.") (internal quotation marks omitted). We are therefore precluded from considering matters beyond the scope of the orders, judgments, or parts thereof specifically designated in the notice of appeal.

Although the Chief Judge is correct that we generally construe the notice of appeal liberally and

avoid "overly technical" readings of Rule 3(c)'s requirements, defendant's notice of appeal unambiguously challenges the district court's determinations relating to his *sentence*. Specifically, the introductory sentence of the notice states:

> Now comes the Defendant, Jerry Paull, by and through his attorney, Kevin M. Cafferkey, who hereby gives Notice of Appeal to the United States Court of Appeals for the Sixth Circuit *from the sentencing* of the United States District Court on the questions of law and fact on the above entitled cause entered by the said district court in its *sentencing* of defendant on April 5, 2007.

(Emphasis added.) The next paragraph of the notice further emphasizes that defendant is appealing his sentence, uses the words "sentence" or "sentencing" four times, and even *designates* specific parts of the sentence as the basis for his appeal:

> That said *sentence* was unreasonable and was greater than necessary to comply with the purposes of *sentencing* as provided for in 18 U.S.C. 3553, et seq. and was in violation of law, and/or was the result of an incorrect application of the *Sentencing* Guidelines and/or is greater than the *sentence* specified in the applicable guideline range.

(Emphasis added.) Defendant cites but two statutes in his notice – 18 U.S.C. § 3742(a) and 18 U.S.C. § 3553 – both of them *sentencing* statutes. Nowhere in the notice did defendant, who was represented by counsel, manifest an intent to appeal his conviction, the district

court's pretrial rulings, the alleged denial of the right to fair trial, or the constitutionality of the statute on which his conviction was based.

However, footnote 1 of the lead opinion states:

> [T]he better reading, in light of the fact that, as the Notice indicates, "counsel was advised . . . to file a Notice of Appeal in a timely manner without the Judgment and Commitment Order, which, to date, has not been journalized," is that this is a generalized notice of appeal sufficient to give us jurisdiction over Paull's entire appeal. This broader reading is confirmed by the Notice's second paragraph beginning "[t]he appeal will also challenge . . . the legality of the sentence" -- language that would not make sense unless Paull intended to challenge the conviction and pre-trial orders as well.

I respectfully disagree. Defense counsel referenced the Judgment and Commitment Order in the notice of appeal to explain why he was filing a *premature* notice of appeal. Defense counsel was clearly concerned about the impact of the district court's delay in entering written judgment on his client's right to appeal. Rule 4(b)(1)(A) of the Federal Rules of Appellate Procedure imposes a strict ten-day deadline for filing notices of appeal after entry of judgment in a criminal case. District judges carefully advise criminal defendants at sentencing of that unforgiving deadline. Accordingly, defendant referenced the Judgment and Commitment Order in his notice not because of its *content*, but because of its *timing* – defendant simply intended to preserve his right to file a timely appeal. Consistent with this interpretation, the notice states:

> *To preserve defendant's right to appeal*, counsel was advised on Monday, April 16, 2007 to file a Notice of Appeal in a *timely manner* without the Judgment and Commitment Order, which, to date, has not been journalized for the docket in this case.

(Emphasis added.)

The first sentence of the second paragraph does not alter this construction of defendant's intent. That sentence reads, in relevant part: "The appeal will also challenge, pursuant to Title 18, U.S.C. 3742(a), the legality of the sentence." In fact, that sentence merely confirms just what it says: that defendant intended to challenge his *sentence*. Contrary to the lead opinion, the word "also" does not demonstrate that defendant intended to appeal matters beyond his sentence. Having already designated his intent to appeal "from the sentencing" in general, defendant simply intended to then articulate those *specific* parts of the sentence to be challenged:

> That said sentence was unreasonable and was greater than necessary to comply with the purposes of sentencing as provided for in 18 U.S.C. 3553, et seq. and was in violation of law, and/or was the result of an incorrect application of the Sentencing Guidelines and/or is greater than the sentence specified in the applicable guideline range.

The notice in this case is similar to the notice in *United States v. Harper*, No. 07-3593 (6th Cir. Oct. 1, 2008) (unpublished) in which we held that the court had jurisdiction to consider on appeal only issues

related to defendant's sentence.[1] The notice in *Harper* read:

> Notice is hereby given that the Defendant in the above-captioned action, Dennis P. Harper, by and through his undersigned attorney, hereby APPEALS to the United States Court of Appeals for the Sixth Circuit from the Sentence of this Court, entered on April 30, 2007, with Judgment in a Criminal Case being filed on May 1, 2007.

Id. at 1. Thus, in *Harper*, although the notice referenced the "Judgment in a Criminal Case," we concluded that "there is no way to reasonably read Defendant's notice of appeal as seeking review of his conviction." *Id.* at 3.

Here, as well, we cannot assume post hoc that defendant intended to appeal issues separate from his sentence simply because the words "Judgment and Commitment Order" appear in the notice. To do so is to impart jurisdiction where there is none. Although we may give an appellant the benefit of the doubt, we cannot render jurisdictional requirements meaningless by stretching them beyond recognition. "[F]ederal courts are courts of limited jurisdiction with only such jurisdiction as is defined by the Constitution and granted by Congress." *Glover*, 242 F.3d at 335 (internal quotations and citation omitted). If defendant

---

[1] Unpublished opinions of this court are not precedentially binding under the doctrine of stare decisis but may be considered for their persuasive value. *United States v. Lancaster*, 501 F.3d 673, 677 (6th Cir. 2007); *United States v. Sanford*, 476 F.3d 391, 396 (6th Cir. 2007).

intended to appeal matters beyond his sentence, he could have, and would have, so stated.

For these reasons, I concur in part and dissent in part. I respectfully dissent from footnote 1 of the lead opinion. However, assuming arguendo our jurisdiction regarding all issues, I join the remainder of Chief Judge Boggs's opinion.

DISSENT

MERRITT, Circuit Judge, dissenting. As a recent October 23, 2008, *Wall Street Journal* article by Amir Efrati points out, our federal legal system has lost its bearings on the subject of computer-based child pornography. Our "social revulsion" against these "misfits" downloading these images is perhaps somewhat more rational than the thousands of witchcraft trials and burnings conducted in Europe and here from the Thirteenth to the Eighteenth Centuries, but it borders on the same thing. In 2008 alone the Department of Justice has brought 2,200 cases like this one in the federal courts. Some trial and appellate judges are sending these mentally ill defendants like Paull to federal prison for very long sentences. But the 17-1/2 year sentence for Paull may be the longest yet. He is a 65-year-old, psychologically disabled, former minister with Type 1 diabetes with many complications.[1] How could this sentence be "not greater than necessary" to punish this crime?

---

[1] *See* the portions of the pre-sentence report concerning Mr. Paull and his problems attached as an appendix.

First, I disagree with my colleagues that the Confrontation Clause permits sentences based on double hearsay for the reasons I previously set out fifteen years ago in *United States v. Silverman*, 976 F.2d 1502, 1524-27 (6th Cir. 1992) (Merritt, dissenting with Judges Keith, Martin and Jones joining). Here the district judge—using a determinate sentence based on Guidelines enhancements—increased Paull's sentence by five levels and many years based solely on hearsay three levels deep about events that are claimed to have occurred many years ago. There was no way for Paull to confront or cross-examine any witnesses, no showing that witnesses were unavailable, not even an effort to show that the evidence was reliable. The recent Supreme Court case of *Crawford v. Washington*, 541 U.S. 36, 54 (2004) ("The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts"), reinforces the views I explained in *Silverman*.

Second, I do not agree that the other determinate sentencing enhancements that ratchet up to 17-1/2 years the sentence based on judge found facts are permissible under the *Blakely-Booker-Cunningham* line of cases. *See, e.g.*, my dissenting opinions in *United States v. Thompson*, 515 F.3d 556 (6th Cir. 2008), and *United States v. Phinazee*, 515 F.3d 511 (6th Cir. 2008). As the Supreme Court explained in *Cunningham v. California*, "Under the Sixth Amendment any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge." 549 U.S. 270, 127 S. Ct. 856, 863-64 (2007). *See also* Justice Scalia's recent dissenting opinion from the failure to grant *certiorari* in *Marlowe v. United States*, 555 U.S. ___ (No. 07-1390, October 14, 2008).

I would, therefore, reverse the judgment of the district court and remand for re-sentencing based only on the facts corresponding to the defendant's guilty plea.

APPENDIX

> The defendant married Donna Rankin in June 11, 1966, in Tuscarawas County, Ohio. Ms. Rankin is 62 years old and is a retired school teacher. The couple have two children: Katherine, who is 40 years old and resides in North Carolina; and Eric, who is 35 years old and resides in Tennessee. Mr. Paull indicated Katherine is not his biological daughter. Rather, she is the daughter of his brother, Phillip, whom the defendant and his wife obtained custody of when she was approximately 18 months old and eventually adopted when she was 5 years old.
>
> . . .
>
> According to information received from the defendant's physician, Mr. Paull has suffered from Type I diabetes for approximately 30 years, with complications resulting in retinopathy, neuropathy and frequent severe hypoglycemia and seizures. Mr. Paull also suffers from osteoporosis and Meniere's disease which results in severe vertigo. The defendant also suffers from hypercholesterolemia, and has a history of bronchiectasis. In 2007, the defendant was also diagnosed with coronary artery disease.
>
> Since 1994, the defendant's diabetes has required him to use an insulin pump to help

regulate his glucose. According to a diagnosis in 2004 by the defendant's physician, Dr. Sheehan, individuals with cardiac autonomic neuropathy similar to Mr. Paull can have a 50% 5 year mortality rate. The doctor also stated due to the defendant's Meniere's disease, he is at significant risk for acute vertigo and falls which, given his osteoporosis, could have disastrous consequences such as bone fractures. Mr. Paull is also prone to pneumonia based on having bronchiectasis.

Mr. Paull is currently prescribed Novalog, Insulin Pump, Plavis, Pravacol, Lisinopril, Actonel Tabs 4, Dyazide, Meclizine, Diazepam (Valium), Nitroquick, Ketoconazole Cream, Ambien CR, and Tiamcinolone Acetone Cream.

In 1991, the defendant did suffer a fall due to his Meniere disease in which he fractured his left shoulder and hip, requiring surgery to both. The defendant has also undergone Angioplasty and had two stents placed in his heart after suffering a heart attack in January 2007. Mr. Paull is currently participating in cardiovascular therapy. The defendant stated he as prone to episodes of vertigo regularly and was prescribed Valium to help reduce the frequency of the attacks. Mr. Paull stated it is unknown what triggers his episodes of vertigo and indicated he last experienced an episode in January 2007.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 07-3482

[Filed January 9, 2009]

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)
v.	)
JERRY PAULL, Defendant-Appellant.	)

Before: BOGGS, Chief Judge; and MERRITT and GRIFFIN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Northern District of Ohio at Cleveland.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX B

AO 245B (Rev. 06/05) Judgment in a Criminal Case

UNITED STATES DISTRICT COURT
Northern District of Ohio

Case Number: 1:05 CR 246 - 001
USM Number: 30098-160

[Dated April 18, 2007]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
JERRY PAULL	)
	)

JUDGMENT IN A CRIMINAL CASE

Kevin M. Cafferkey, Esq.
Defendant's Attorney

THE DEFENDANT:

[✓] pleaded guilty to count(s): One of the Indictment of the Indictment.

* * *

The defendant is adjudicated guilty of these offense(s):

Title & Section	Nature of Offense	Offense Ended	Count
See next page.			

The defendant is sentenced as provided in Pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * *

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and the United States Attorney of material changes in the defendant's economic circumstances.

April 5, 2007
Date of Imposition of Judgment

/s/ Donald C. Nugent
Signature of Judicial Officer

Donald C. Nugent, United States District Judge
Name & Title of Judicial Officer

April 18, 2007
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. Section 2252(a)(2)	Receiving Child Pornography	4/29/03	One
18 U.S.C. Section 2252(a)(2)	Receiving Child Pornography	2/18/04	Two
18 U.S.C. Section 2252A(a)(2)	Receiving Child Pornography	2/18/04	Three
18 U.S.C. Section 2252A(a)(5)(B)	Possession of Child Pornography	7/23/04	Four

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of one hundred eighty months on Count One, two hundred ten months on Count Two, two hundred ten months on Count Three and to one hundred twenty months on Count Four all to run concurrent.

* * *

[✓] The defendant is remanded to the custody of the United States Marshal.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of eight years with the usual conditions and additional conditions as directed. The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons. The defendant shall follow all special conditions as notified concerning all sexual offender conditions, the use of computers, and examination of computer systems, etc.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the Court.

* * *

[✓] The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

[✓] The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

[✓] The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

* * *

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the

defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISED RELEASE

The defendant shall participate in a substance abuse treatment program, either inpatient or outpatient, at the directon of the probation officer, which may include testing to determine if the defendant has reverted to substance abuse.

The defendant shall participate in a mental health treatmen program at the direction of the probation officer.

The defendant shall submit his/her person, residence, place of business, computer, or vehicle to a warrantless search, conducted and controlled by the U.S. Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall inform any other residents that the premises may be subject to a search pursuant to his condition.

The defendant will comply with all applicable requirements to register as a sexual offender. The defendant shall not seek, obtain or maintain any residence, employment, volunteer work, church or recreational activities involving minors (persons under the age of 18) in any way, without the prior express written approval of the probation officer. At the direction of the probation officer, the defendant shall participate in an outpatient mental health program,

including treatment for sexual deviancy, which may include polygraph testing.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Sheet 6.

	Assessment	Fine	Restitution
Totals:	$400.00	N/A	N/A

* * *

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

* * *

F [✓]A special assessment of $400.00 is due in full immediately as to count(s) _1,2,3, and 4_. PAYMENT IS TO BE MADE PAYABLE AND SENT TO THE CLERK, U.S. DISTRICT COURT

* * *

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the imprisonment. All criminal penalties, except those payments made through the Federal Bureau of

Prisons' Inmate Financial Responsibility Program, are made to the Clerk of Court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

* * *

Payments shall be applied in the following order: (1) assessment; (2) restitution principal; (3) restitution interest; (4) fine principal; (5) fine interest; (6) community restitution; (7) penalties; and (8) costs, including cost of prosecution and court costs.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

CASE NO. 1:05 CR 246

[DATE: January 23, 2007]

UNITED STATES OF AMERICA,	)
	)
-VS-	)
	)
JERRY PAULL	)
	)

Minutes of Proceedings before
DONALD C. NUGENT
United States District Judge

COURT REPORTER: Judy Gage

MOTION HEARING/CHANGE OF PLEA

APPEARANCES: Plaintiff: Mike Sullivan, Esq.

Defendant: Dean Bolen, Esq.

PROCEEDINGS: Hearing held in open Court w/ counsel – Motion to Dismiss Vagueness is Denied as well as the other pre-trial motions are all Denied.

Case cont'd @ Def's request to 1/24/07 @ 8^{30} AM

/s/ Donald C. Nugent 1/23/07

Length of Proceedings: 60 Min

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

CASE NO. 1:05 CR 246

[DATE: January 12, 2007]

UNITED STATES OF AMERICA,	)
	)
-VS-	)
	)
JERRY PAULL	)
	)

Minutes of Proceedings before
DONALD C. NUGENT
United States District Judge

COURT REPORTER: Judy Gage

MOTION HEARING CONTINUED

APPEARANCES: Plaintiff: Mike Sullivan, Esq.

Defendant: Kevin Cafferkey, Esq.
And Attorney Bolan, Esq.

PROCEEDINGS: Arguments of counsel made and for reasons set forth on record, Def's Motion to Suppress Search Warrant & Motion to Suppress Oral & Written Statements are Denied. Trial remains as scheduled.

/s/ Donald C. Nugent
JUDGE DONALD C. NUGENT

Length of Proceedings: 30 Min

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 07-3482

[Filed March 26, 2009]

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
JERRY PAULL,	)
	)
Defendant-Appellant.	)
	)

ORDER

BEFORE: BOGGS, Chief Judge; MERRITT and GRIFFIN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Merritt would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk